No. 80-938

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

BURBANK ANTI-NOISE GROUP, NORTH HOLLYWOOD HOMEOWNERS' ASSN., SHERMAN OAKS HOMEOWNERS' ASSN., STUDIO CITY HOMEOWNERS' ASSN., SUN VALLEY HOMEOWNERS' ASSN., and VAN NUYS HOMEOWNERS' ASSN.,
Petitioners,

vs.

NEIL E. GOLDSCHMIDT, FEDERAL AVIATION ADMINISTRATION, LANGHORNE M. BOND, STATE OF CALIFORNIA, LOCKHEED AIR TERMINAL, INC., and HOLLYWOOD-BURBANK AIRPORT AUTHORITY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
to
Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

In the Respondents' view only one issue is presented by the Petition, namely, may a court determine that the National Environmental Policy Act (42 U.S.C. § 4321, *et. seq.*) does not require the preparation of an Environmental Impact Statement for the acquisition of an existing, operating airport, where the purpose of the acquisition is the preservation of the *status quo*.

The following subsidiary issues would arise in the event of review in this matter:

1. Whether the District Court properly granted summary judgment on the alternative basis that an Environmental Impact Statement, which actually was prepared, complied with statutory requirements.

2. Whether final disposition by the California courts of identical issues arising under the California Environmental Quality Act, California *Public Resources Code* § 21100, *et. seq.*, bars the present action under the doctrine of collateral estoppel.

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The Respondents, Hollywood-Burbank Airport Authority, Lockheed Air Terminal, Inc., and State of California, acting by and through the Department of Transportation, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF THE CASE

This matter comes to this Court upon the decisions of the United States District Court for the Central District of California and the Court of Appeals for the Ninth Circuit applying the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 *et seq.*). Both courts held that where a transfer of an existing and operating airport from private to public ownership does not involve expansion or change in the *status quo,* the federal agency involved is not required to prepare an Environmental Impact Statement (EIS).[1]

Petitioners' action was originally filed in the District Court on October 17, 1977. Plaintiffs, six homeowner associations, sought injunctive and declaratory relief against the federal Defendants, alleging a failure to prepare an adequate EIS under NEPA.[2]

The project for which Petitioners alleged an EIS was required involved the public acquisition, with partial federal funding, of the Hollywood-Burbank Airport from its prior owner, Lockheed Air Terminal, Inc. (LAT).

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[1]An extensive EIS was in fact prepared in this case and the determination of its adequacy formed an additional and alternative basis for judgment in favor of Respondents in the District Court. This issue was not discussed by the Ninth Circuit in view of its decision that, as a matter of law, no EIS was required by NEPA.

[2]The same Plaintiffs also filed a state case under the California Environmental Quality Act, California *Public Resources Code* § 21000 *et. seq.* After a lengthy trial the Superior Court in Los Angeles ruled that no Environmental Impact Report (EIR) was required under California law and, in any event, that the EIR that was prepared was adequate. *Burbank Anti-Noise Group v. City of Burbank,* (LASC Case No. C20743). An appeal from the superior court's decision has since been dismissed.

This acquisition was consummated on June 30, 1978, when the airport was acquired from LAT by the Hollywood-Burbank Airport Authority (HBAA) pursuant to California *Government Code* § 6456.1, specifically enacted by the Legislature to authorize the public acquisition of the Hollywood-Burbank Airport. For the past two and one-half years the airport has been owned and operated by HBAA, which is now known as the Burbank-Glendale-Pasadena Airport Authority.

On May 8, 1978, District Court Judge Irving Hill granted summary judgment in favor of all Defendants, holding that no EIS was required by NEPA and further holding that if an EIS was necessary under NEPA, the one which had been prepared was legally adequate. The court provided a thorough and well reasoned statement of its analysis, a copy of which is appended to the Petition herein as Exhibit "B".

The Ninth Circuit Court of Appeals affirmed, in a *per curiam* opinion filed on July 14, 1980, holding that under NEPA an EIS is not required where, as here, the proposed federal action would effect no change on the *status quo*.

NEPA and the substantial body of case law interpreting it fully support the holdings of both courts below. This case presents no unique, unsettled, or important issues of federal law. It is, accordingly, an inappropriate candidate for review by this Court.

REASONS FOR DENYING THE WRIT

I

THE PETITION FAILS TO SET FORTH ANY REASON, SUFFICIENT UNDER RULE 17, FOR THIS COURT TO GRANT A WRIT OF CERTIORARI TO REVIEW THE NINTH CIRCUIT'S PER CURIAM OPINION

Petitioners have failed to demonstrate any of the requisite grounds for granting certiorari (Rules, U.S.Sup.Ct., Rule 17). They have not identified any conflict in the decisions of the circuit courts. Nor have they been able to establish that the decision below involves important issues of federal law which should be settled by this Court. As will be shown, this case is but one more in a long line of cases holding that Congress meant exactly what it said when it limited NEPA to major federal actions ". . . significantly affecting the quality of the human environment. . . ." (42 U.S.C. § 4332(2)(C))

A. The Decision Below Is Consistent With a Uniform Body of Pre-Existing Case Law Which Establishes That an EIS Is Not Required for a Project That Has No Effect on the Status Quo

In the instant case, the Court of Appeals agreed with the conclusion of the District Court that NEPA does not require the preparation of an EIS where the federal government provides financial assistance for the acquisition of an existing and functioning public use airport, which will merely be continued in use as it was before the acquisition.

As stated by the Ninth Circuit below:

> "NEPA requires federal agencies to prepare an EIS for all 'major federal actions significantly affecting the quality of the human environment.' (42 U.S.C. § 4332(2)(C) . . . ."
>
> • • • •
>
> "An EIS is not required, however, when the proposed federal action will affect no change in the *status quo*. . . ."

Not surprisingly, Petitioners have failed to demonstrate any cases in conflict with this conclusion. In fact, the cases are uniformly consistent with it.

In *Borough of Fairfield v. Coleman*, 8 E.R.C. 1518 (D.C.N.J. 1975), *aff'd without opinion*, 532 F.2d 745 (3rd Cir. 1976), a case which presents remarkably similar factual and legal issues, the court held that as a matter of law, ". . . no environmental impact statement is required for the act of financing the acquisition of an existing airport." 8 E.R.C. at 1521.

The court granted summary judgment holding that "NEPA does not apply" where "the aim as here is simply to preserve an airport that is presently functioning, without altering it. . . ." 8 E.R.C. at 1521. Even more pertinent for the present case is the District Court's legal analysis:

> "Title 42 U.S.C. § 4332 requires the preparation of an Environmental Impact Statement for any '. . . major Federal action significantly affecting the quality of the human environment. . . .' The partial funding of the EIS in its effort to purchase (and thereby preserve for aviation use) the existing and functioning Caldwell-Wright Airport does not fall into this cate-

> gory of federal action. *The only aim here is the preservation of the status quo.* No further development is encompassed within the framework of the Grant Agreement *sub judice.*" 8 E.R.C. at 1521. (Emphasis added.)

To the same effect is the decision of the circuit court for the District of Columbia in *Committee for Auto Responsibility v. Solomon,* 603 F.2d 992 (D.C.Cir. 1979), *cert. denied, sub nom., Committee for Auto Responsibility v. Freeman,* 445 U.S. 915 (1980). This case involved a lease of the Great Plaza area of the Federal Triangle in Washington, D.C., for continued use as a parking facility. The court held:

> "The duty to prepare an EIS normally is triggered when there is a proposal to change the *status quo*. . . ."
>
> • • • •
>
> "To compel GSA to formulate an EIS under these circumstances would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment. . . ." *Id.* at 1002-03.

Other cases have reached a similar result. See, *City and County of San Francisco v. United States,* 615 F.2d 498 (9th Cir. 1980), holding that no EIS was required for the lease of a navy shipyard to a private ship repair company; and *Westside Property Owners v. Schlesinger,* 597 F.2d 1214 (9th Cir. 1979), holding that an EIS need not discuss the overall existing environmental impacts associated with the continued operation of an airbase.

Thus, the decision below continues the unbroken line of cases holding that a federal agency need not prepare an

EIS where the project does not involve a change in the *status quo*.

B. The Court Properly Decided the Legal Issue of Whether an EIS Was Required by NEPA

Petitioners argue that procedurally the issue of the need for an EIS was not properly before the court below because no party filed a suit challenging the Federal Aviation Administration's (FAA) decision to do an EIS. Petitioners, however, acknowledge that this very question was raised by Respondents as an affirmative defense by answer to Petitioners' complaint in the District Court. (Petition, pp. 15-16.) The issue was therefore appropriately before both of the courts below. Indeed, it was identified as a "genuine issue of fact" by the Petitioners in the District Court; it was briefed and argued by parties; and, it properly formed the basis of the decision by the Ninth Circuit.

Moreover, Petitioners' procedural argument is obviously inappropriate to a Petition for Writ of Certiorari.

In a further attempt to divert attention away from settled case law, and to create an illusion of a conflict between the decision here and in other cases, Petitioners allude to numerous cases where the courts have declined to second-guess agency decisions *not* to prepare an EIS. Petitioners then argue that where, as here, an agency actually prepares an EIS, such a decision should not only be given similar deference, but that the courts actually *lack jurisdiction* to make a contrary determination. Such a proposition is not only without basis in the case law,

it is contrary to the very essence of the administrative process NEPA was designed to create.

It is not disputed that the FAA prepared an EIS. Nor can it be disputed that two federal courts and a state court concluded that the mere change of ownership of the airport *as a matter of law* did not trigger the need for environmental impact documents and that these decisions are consistent with all extant authority on the question. Petitioners in effect argue, however, that once FAA prepares an EIS, *for whatever reason*, the courts are precluded from considering the legal question of whether one was required under NEPA.

This startling conclusion is predicated solely upon cases articulating the standard of review applicable to administrative conclusions that NEPA does *not* require preparation of an EIS. (Petition, p. 11.) These cases are irrelevant to this action for at least two reasons.

First, it is a *non sequitur* to conclude, from these cases, that when a federal agency does prepare an EIS, the courts are barred from interpreting NEPA and concluding that an EIS was not required by that statute. The cases relied on by Petitioners deal only with standards of review, and not the power of the courts to exercise jurisdiction.

As the District Court below observed:

> "I am of the tentative view that the summary judgment ought to be granted on this ground, the ground that no EIS was required. One was, of course, obtained. I don't know whether it was obtained out of an abundance of caution because it arguably might be required, or because of someone's mistake of law. But

> whichever, it is my tentative view that obtaining an EIS does not, by estoppel or otherwise, foreclose a court from determining if one was required under the law, or precludes the defendants from arguing that none was required."

Second, the cases cited by Petitioners, dealing as they do with administrative decisions *not* to prepare an EIS, cannot even arguably be interpreted as establishing a standard of review in a case where an EIS was prepared. The two types of decisions are *fundamentally different.* One *necessarily* involves an administrative determination regarding applicability of the underlying statute. The other does not.

In short, a decision *not* to prepare an EIS *inherently* involves a determination of whether, under the facts of a particular case, measured against the legal standard contained in the pertinent statute, one is required. In such cases, courts have appropriately given deference, though not blind adherence, to the agency's conclusion on NEPA's inapplicability. But a contrary decision, *i.e.,* a decision to prepare an EIS, does not necessarily involve any such determination, *for such a decision can reflect many considerations other than legal requirement.* A federal agency may decide to prepare an EIS simply because of an independent desire for environmental analysis, whether legally required or not. On the other hand, the agency may be unsure of whether an EIS is required under NEPA and may thus desire to proceed on the side of caution. Additionally, a public agency may merely desire to accommodate demands of interested members of the public. These, and

countless other reasons, including those of a political nature, can motivate a decision to prepare an EIS—even though NEPA may be totally inapplicable to the situation involved.

Accordingly, the cases cited by Petitioners in support of their argument that the courts below should have deferred to FAA's decision to prepare an EIS are simply not applicable. Such cases are clearly not in conflict with the holding of the Ninth Circuit here. Moreover, the rule advocated by Petitioners would only discourage public agencies from voluntarily preparing environmental analyses for reasons of policy.[3]

II

PETITIONERS' BELATED "LOCATION APPROVAL" ARGUMENT ADDS NOTHING TO THEIR POSITION

Finally, in a collateral attack on the two opinions below, Petitioners argue that this case involved not only a feder-

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[3]Throughout their brief, Petitioners have strained to create the impression that FAA actually made a determination that NEPA required an EIS. Thus, Petitioners repeatedly assert that the FAA determined that "an EIS *was* required. . . ." In so doing, however, they are very careful to avoid specifying whether any such determination was premised on the agency's interpretation of NEPA or upon independent policy grounds. Actually, there is nothing in the Administrative Record indicating that FAA made a determination that an EIS was required by NEPA, or, for that matter, by any other provision of law. The record only reflects a decision to do one. Indeed, the only support Petitioners could even locate for use of the term "required" is the response to a leading question to a staff employee of FAA put in a deposition long after the administrative action had been taken and finalized. Such a question, even if otherwise probative, and not subject to evidentiary objection, could not alter the administrative action actually taken.

ally funded transfer of ownership, but also "location approval" of the airport. (Petition, p. 17.) This contention creates no issue sufficient under Rule 17 to warrant granting the writ and is, moreover, substantively meritless.

The airport acquired in this case was an existing and functioning facility at the time it was sold to HBAA. It was constructed in 1930 and has been in continuous operation from that time to the present. The act of approving the location of the facility had no more effect on the environment than the transfer of ownership. As applied to the instant situation, the concept of "location approval" did not in any way signify approval of the siting and construction of a new airport. It meant only that the location of the *existing* airport was approved for federal funding. Petitioners' argument is at most make-weight and adds nothing to the requirements of NEPA. There is no significant environmental effect identified in the "location approval" argument and there is no basis justifying the need for an EIS under this theory.[4]

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[4]Petitioners also rely on FAA's *Policies and Procedures for Considering Environmental Impacts*, Appendix 2, § 3, for their conclusion that the location approval of an airport requires an EIS. The section is cited out of context and has nothing to do with airport programs or airport location. It is part of Appendix 2 dealing with "Airway Facilities", such as FAA Air Route Traffic Control Centers, Air Route Surveillance Radars, Flight Service Stations, and various other FAA communication and navigation facilities. Moreover, the section quoted, on its face, is limited to "facility siting and design." In the instant situation, even if the section were otherwise relevant, it would not be applicable, because the Hollywood-Burbank Airport was established years ago, as was its design, and the present proposal involved no change whatever. In any event, petitioners have failed both here and below to cite any federal regulation which purports to expand the requirement for an EIS beyond that provided for in NEPA or which would require an EIS for the mere transfer of ownership of an airport.

Moreover, Petitioners failed to raise this issue in the District Court;[5] and, although it was raised before the Court of Appeals, that court affirmed without discussing the issue. Under such circumstances, it is customary for this Court to decline to consider such a legal claim. *National Labor Relations Board v. Sears Roebuck and Company*, 421 U.S. 132, 163-164 (1975); *Ramsey v. United Mineworkers of America*, 401 U.S. 302, 312 (1971).

III

ASSUMING ARGUENDO THE EXISTENCE OF CHANGED CONDITIONS, THE ADMINISTRATIVE RECORD MUST BE VIEWED IN LIGHT OF THE FACTS AS THEY EXISTED AT THAT TIME

Petitioners refer this Court to certain documents attached to their Petition for Rehearing below. They then assert that these documents show that noise levels have, in fact, increased since the determination made by the FAA in this case.

Despite the manifest incompetence of this evidentiary presentation, Respondents feel constrained to note they take issue with both the characterization and content of

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[5]Petitioners assert the contrary by arguing that much of their case below "addressed the impact of this airport's location on its neighbors. . . ." (Petition, p. 21). However, arguments directed *factually* to the noise impacts of an airport, and the adequacy of their discussion in the EIS, have nothing whatever to do with the *legal issue* of whether so-called "location approval", in and of itself, triggers the requirements of NEPA. Such a legal argument was simply not made in the District Court.

these documents. Substance apart, Petitioners' tardy attempt to introduce what amounts to multiple hearsay material, irrelevant to the factual issues resolved below, is improper at this stage in the litigation. If Petitioners believe that the airport is now being operated in violation of state law, or in violation of the federal Grant Agreements issued by the FAA, they must look to other remedies outside of this litigation. This case must be judged by the facts and circumstances as they existed at the time of the federal agency's action.

As this Court stated in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., et al.*, 435 U.S. 551 (1978):

> "We have also made it clear that the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both *by the time at which the decision was made* and by the statute mandating review." *Id.* at 555. (Emphasis added.)

This Court also quoted from *ICC v. Jersey City*, 322 U.S. 503 (1944) stating:

> "'Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] . . . . If upon the coming down of the order litigation might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in

an order that would not be subject to reopening.' . . ." *Id.* at 554-55.

Finally, Petitioners' reference to these matters, outside of the record,[6] hardly shows the existence of any important questions of federal law which would warrant consideration by this Court.

IV

REVIEW BY THIS COURT MUST ENTAIL RESOLUTION OF ADDITIONAL ISSUES

An additional reason why this Court should not grant the Writ of Certiorari is the fact that there are other grounds upon which this case may be decided without reaching the questions presented by the Petition. See, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959). Those additional grounds were not dealt with by the court below, but were considered by the District Court.

A. The District Court Properly Granted Summary Judgment on the Additional Ground That the EIS Actually Prepared Fully Complied With Legal Requirements

The Administrative Record before the court below demonstrated that the documentation regarding the environmental impacts of the existing airport fully complied with the requirements imposed by NEPA. The EIS presented, *inter alia*, a wide range of scientific data and analyses including noise measurement studies and projections, as well as data on air pollution, traffic studies and a host of other subjects. As a matter of law, all procedural requirements of NEPA were fully met.

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[6]This Court has refused to consider material not in the record. *Lawn v. United States*, 355 U.S. 339, 354 (1958); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n. 66 (1970).

The District Court, after a review of the EIS and all additional material submitted by the Petitioners below, concluded that there was no genuine issue of fact to be tried. As a matter of law, Petitioners' documents did not reveal the existence of any inadequacies in the EIS when measured in light of the statutory requirements as now interpreted by a large and settled body of case law.

Since this Petition can and should properly be disposed of on the basis that no EIS was necessary, Respondents believe that it would be inappropriate to burden the Court with lengthy legal arguments on this issue at this time. They were, of course, fully presented before the Ninth Circuit. This Court also has before it the well reasoned and thorough analysis by Judge Hill, which is set forth at pages 19-35, inclusive, of his decision. (Petition, Exhibit "B".) Respondents do, of course, reserve this alternative ground in support of the judgment. Moreover, as noted above, the very existence of this alternative ground also provides a persuasive reason why review should be denied.

B. Petitioners' Challenge to the FAA's Decision Approving Partial Funding of the Public Acquisition of the Hollywood-Burbank Airport Is Barred by the Doctrine of Collateral Estoppel

The present action is the analog of the earlier action filed in the Los Angeles County Superior Court, wherein Petitioners challenged the adequacy of the EIS, therein denominated an EIR, under the California Environmental Quality Act (CEQA), California *Public Resources Code* § 21000 *et seq.* The case came to trial in November of 1977

before Judge Ernest Zack. On December 28, 1977, at the conclusion of the Plaintiffs' case, during which substantial detailed expert testimony was heard, and voluminous documentary evidence taken, Judge Zack granted defendants' Motion for Judgment under California *Code of Civil Procedure* § 631.8. That judgment was founded upon findings of fact which are sufficient to dispose of the present action under the doctrine of collateral estoppel.

These findings provided, *inter alia,* that the project is for a transfer of ownership of an existing airport which does not contemplate any physical expansion of the airport or its terminal facilities.

The legal criteria for determining the validity of a plea of collateral estoppel is threefold:

1. There must be a final judgment on the merits; and,

2. The parties against whom the plea is asserted must be identical; and,

3. The issues decided in the prior adjudication must be identical to the ones presented in the subsequent action. *Blonder-Tongue Lab, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971).

The Plaintiffs in the state case and this case are identical and the decision against Petitioners in that case has now become final under California law.

The basic requirements of NEPA and CEQA are the same. The California statute was modeled after the federal law. Courts have used federal and state cases construing these statutes interchangeably.

This was confirmed by the California Supreme Court in *No Oil, Inc. v. City of Los Angeles,* 13 Cal.3d 68 (1974):

> "[S]ince the California act was modeled on the federal statute, judicial and administrative interpretation of the latter enactment is persuasive authority in interpretating the California act." *Id.* at 86.

Federal courts have also recognized the identity of the two statutes. *City of Davis v. Coleman,* 521 F.2d 661 (9th Cir. 1975).

Thus, the District Court below was persuaded that collateral estoppel would be applicable if the state case was final under state law:

> "I say that a summary judgement would be proper if that decision was final because of the identity of the plaintiffs in the two cases and the identity of the legal questions involved." [R.T. p. 7].

Since such finality has occurred, it provides an alternative basis of support for the judgment and an additional ground for denying the writ.

CONCLUSION

It is respectfully submitted that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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